UNITED STATES
v.
LEON NOYCE AND THOMAS ROKITA

IBLA 79-591 Decided October 29, 1981

Appeal from a decision of Administrative Law Judge R. M. Steiner declaring lode mining claims null and void. Contests CA 5077 and CA 5125.

Affirmed.

1. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Lode Claims

   The discovery of a valuable mineral deposit is essential to a valid mining claim. There must be exposed within the limits of a lode mining claim a vein or lode of rock in place bearing mineral of such quantity and quality that a prudent person would expend time and means with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Lode Claims

   The "marketability test" is a refinement of the "prudent man test" and requires that extraction, removal, and marketing costs be considered, as such factors directly bear on the question whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

3. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Lode Claims -- Mining Claims: Withdrawn Land

Where a mining claim is situated on land subsequently withdrawn from operation of the mining laws, the validity of the claims must be tested by the value of the mineral deposit as of the date of withdrawal, as well as the date of the hearing. If the claim was not supported at the date of the withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market.

4. Contests and Protests: Generally -- Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Hearings

Where the Government contests the validity of a mining claim, it bears only the burden of establishing a prima facie case of lack of discovery; the burden then shifts to the claimant to overcome the Government's showing by a preponderance of the evidence. A prima facie case is established when a Government mineral examiner testifies that he examined the claim and found insufficient evidence of the discovery of a valuable mineral deposit.

APPEARANCES: Leon Noyce and Thomas Rokita, pro sese; John McMunn, Esq., Office of the Field Solicitor, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Leon Noyce and Thomas Rokita appeal the decision of Administrative Law Judge R. M. Steiner dated August 10, 1979, declaring the Golden Treasure, Redeamer, and the It lode mining claims 1/ null and void.

1/ The claims are situated within the exterior boundaries of the Death Valley National Monument, in Inyo County, California. On Sept. 28, 1976, those lands were closed to mineral entry. 16 U.S.C. § 1901 (1976). Specifically, the Golden Treasure and Redeamer claims are situated in protracted sec. 3, T. 21 N., R. 3 E., and protracted sec. 34, T. 22 N., R. 3 E., San Bernardino meridian. The It claim is situated in protracted NW 1/4 sec. 20, T. 20 N., R. 5 E., San Bernardino meridian.

On behalf of the National Park Service (NPS), the Bureau of Land Management (BLM) initiated contest proceedings CA 5077 against the Golden Treasure (Treasure) and Redeamer claims on June 2, 1978, and CA 5125 against the It claim on July 7, 1978, alleging, inter alia, lack of "minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery."

Appellants timely answered the contest complaints, denying the charge and challenging the adequacy of the mineral examinations supporting the complaints. Appellants also charged that NPS had denied them access to the claims.

On December 6, 1978, a hearing was held before Judge Steiner in Las Vegas, Nevada. Appellants appeared pro sese. At the request of the Government and over the initial objections of the contestees, the Judge consolidated the two contests in a single hearing, and later into a single decision.

The Government's case was presented by a single witness, Amos Klein, a geologist-mining engineer employed by NPS, who was duly qualified as an expert witness. Klein testified that he examined the Treasure and Redeamer claims on January 17, 1978, and the It claim on March 6, 1978, accompanied each time by appellant Noyce. Noyce indicated discovery points on the Redeamer and It claims, and though he indicated generally a shaft and two adits, he did not designate a discovery point on the Treasure claim (Tr. 16-17). On December 4, 1978, Klein reexamined the It claim.

In the presence of Noyce, Klein obtained a chip sample from a 4-foot face on the It claim, as indicated by appellant. The sample was bagged, marked, and conveyed to Herbert Ochs, an assayer in Denver, Colorado (Tr. 24).

On the Treasure claim, appellant Noyce stated that the discovery point was within a shaft. He would not enter it, however, presumably because it was in a hazardous condition. Klein also declined to enter. On appellant's suggestion, Klein obtained two grab samples from the dump (Tr. 29).

On the Redeamer claim, Klein obtained a 1-foot chip sample cut across the entire width of a quartz vein, at a place designated by appellant (Tr. 30-31). The Treasure and Redeamer samples were conveyed to Jacobs Assay, Tucson, Arizona.

The results of the Ochs' and Jacobs' assays showed the following values from the Treasure claim: .05 and .11 ounces of gold, and .35 and .10 ounces of silver per ton; from the Redeamer claim: .70 ounces of gold and 3.50 ounces of silver per ton; from the It claim: .06 ounces of gold and 1.7 ounces of silver per ton, plus 11.7 percent lead, 6.7 per cent zinc, and .20 percent copper.

Klein stated that these mineral values are not significant. When questioned on direct examination as to his reasons for this characterization, Klein stated:

> Well, in my opinion this isn't enough to really get excited about. I just can't imagine so little gold and so little silver that would generate very much interest. I don't think that it is sufficient, I just really don't. It is my opinion. It's strictly an opinion. I just don't think it's enough.

(Tr. 34).

Based on his opinion, Klein testified that none of the three claims at issue could be developed into a paying mine. On several occasions during the hearing, he remarked that "the best evidence of discovery is production and there is no production going on at the present time" (Tr. 35-36).

During cross-examination of Klein, appellant Noyce stated that he, Noyce, had panned quartzite containing gold samples from the Redeamer claim. According to appellant, the presence of gold is "spotty," ranging from $5 to $5,000 per ton. In addition, he stated that he had seen "some very high grade samples come out of there with visible gold right in the rock" (Tr. 41-42). The witness agreed that mineralization could be spotty, but stated that he "couldn't agree to the extent of the value because I don't know" (Tr. 43).

After noting that the Redeamer assay indicates $140 in gold per ton (1978 prices), Judge Steiner questioned Klein further regarding his opinion that the mineral values are "insignificant." The witness responded:

> Because I don't think values of that kind are sufficient to at this day and age the cost of labor and things of this nature, costs, and other costs that go with it would, could justify the expenditure in my opinion to recover ore of that grade would be in excess of the return and, therefore, I don't think for that reason it is sufficient or significant. [sic]

(Tr. 49).

On redirect examination, Klein stated that in September 1976 during the month in which the land on which these claims are situated was withdrawn from mineral entry, gold was $118.50 per troy ounce and silver was $4.33 per troy ounce (Tr. 51). 2/

2/ These valuations were quoted by Klein, using the Oct. 1976 issue of the Engineering and Mining Journal.

Appellant Noyce stated that the ore within the subject claims is of free-milling grade and that gold is recoverable "almost on the spot or at least as near as water is available." According to appellant Rokita, water is available within 12 miles of the It claim. By comparison with past mining operations in the area in which appellants were active, Noyce suggested that ore could be crushed in a stamp mill and transported by burro. The gold would be recovered by amalgamation, a process which does not require a smelter. He further contended that free milling without the use of cyanide would recover all but $10 of gold per ton; use of cyanide would recover all but $2 per ton (Tr. 55).

Asked for his opinion as to whether minerals could be mined as appellant suggested, Klein agreed, but again asserted his opinion that gold within the claims "no longer exists and what is left * * * is not economical because if it were economic[al] * * * the best evidence of discovery is production" (Tr. 55-56).

Appellants' testimony in their own behalf may be summarized as follows. Both admit that since locating the claims in 1974 and 1975, neither has done any development work on the subject claims (Tr. 61, 64, 76). Rokita stated that he had recovered free gold on the Treasure claim, which he described as erratically mineralized (Tr. 64). He asserted that the loose material referred to as a dump on the It claim is actually an ore stockpile containing high grade ore (Tr. 66). It appears that this material was deposited on the surface of the claim at the time or times unknown to appellants, and although Noyce has contributed to the stockpile, it was largely placed there by previous miners (Tr. 66-67). Rokita stated that he could contract for development work on the claims, but admitted in cross-examination that he had done nothing so far in that regard (Tr. 69).

Rokita produced a report from the Mariposa Spectrographic Laboratory in Mariposa, California, dated January 28, 1965, which he asserted included a sample from the It claim. 3/ Noyce conceded that the It sample taken by Klein was obtained from a point which in his opinion contains the best exposure of mineralization (Tr. 71, 73). On the Treasure claim, the discovery point is within an inaccessible shaft (Tr. 75). On the Redeamer, Klein obtained samples from the discovery point (Tr. 76).

In his decision of August 10, 1979, Judge Steiner held the Treasure, Redeamer, and It claims null and void on the ground that no valuable mineral deposits have been discovered within the limits of the claims. On appeal, appellants allege several errors in the decision. First, the expertise of the Government's witness is questioned. In

3/ Appellants state that under earlier locations by others, the It claim has been known as the Ibex and the arcturies. Sample #9 of the report is identified as "Buckwheat" with a handwritten query "Arcturas? Mine." Assuming, arguendo, that sample #9 was taken from the It claim, it shows .10 ounces of gold per ton, at $35 per troy ounce; 4.34 ounces of silver per ton, at $1.285 per troy ounce; and 19.7 percent lead.

particular, appellants contend that Klein's characterization of certain fault zone(s) as unmineralized does not comport with the usual significance attributed in the industry to the presence of a fault zone. Appellants argue instead that a fault generally indicates the presence, rather than the absence, of valuable mineralization.

It is urged that the mineral examinations were superficial and unrevealing. Appellants argue that the witness' lack of expertise is demonstrated by what they point to as misuse of the terms of art, e.g., "stope" vis-a-vis "shaft," and "dump" vis-a-vis "stockpile." Regarding the latter, appellants contend that the loose material deposited on the surface of the It claim is not waste, but an accumulation of mill grade ore deposited at a time when richer ore was being mined from the claim.

Appellants point to the witness' assertion that lack of current production is the best evidence in support of his opinion that all valuable ore has been mined, and argue that "the reason for that [lack of current production] is that the Park Service kept making rules and regulations that made it impossible, by not allowing us to keep our road in passable shape, so that we could haul out the ore already mined." Appellants further contend that the advent of World War II was the principal reason that profitable mining operations were shut down, rather than the virtual exhaustion of mineral values in the area.

In addition, the joint statement of reasons contains the following assertion regarding the Treasure claim: "I showed Mr. Klein the discovery point but he claimed it was [not] proper because it was covered up with ore, but the Park Service would [not] let me un[cover] it, on the grounds I would be disturbing the surface." Appellants contend that on the It claim they uncovered ore below a 30-foot cut described by Klein (Tr. 20-24), but that due to its proximity to a wash, it had been again covered by debris.

Lastly, appellants also challenge the under-pricing per troy ounce by the assayers, citing well-known and steady increases in the prices of gold and silver in recent years.

[1] Before discussing the evidence, it will be useful to set forth applicable principles. The discovery of a valuable mineral deposit is essential to a valid claim. Under the "prudent man test," in order to qualify as a valuable mineral deposit, the discovered deposits must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Converse v. Udall, 399 F.2d 616, 619 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Estate of W. R. Wood, 34 IBLA 44 (1978); United States v. Becker, 33 IBLA 301 (1978).

[2] The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. This latter does not set forth a

distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

A government mineral examiner in determining the validity of a mining claim need only examine the claim to verify whether the claimants have made a discovery. He is not required to perform discovery work, to explore or sample beyond the claimants' workings, or to rehabilitate alleged discovery cuts to establish the Government's prima facie case of no discovery. United States v. Chambers, 47 IBLA 102 (1980); United States v. Russel, 40 IBLA 309 (1979); United States v. Fisher, 37 IBLA 80 (1978). It is incumbent upon a mining claimant to keep discovery points available for inspection by a Government mineral examiner. United States v. Smith, 54 IBLA 12 (1981); United States v. Timm, 36 IBLA 316 (1978).

Discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. To constitute a discovery there must be exposed within the limits of the claim a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. United States v. Rosenkrantz, 46 IBLA 109 (1980); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978); United States v. Kingdon, 36 IBLA 11 (1978); United States v. Garula, A-29948 (June 3, 1964); United States v. Josephine Lode Mining & Development Co., A-27090 (May 11, 1955).

[3] Where a mining claim is situated on land subsequently withdrawn from operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as the date of the hearing. If the claim was not supported at the date of the withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market. United States v. Kuretich, 54 IBLA 124 (1981); Andrew J. Van Derpoel, 33 IBLA 248 (1978).

[4] Where the Government contests the validity of a mining claim on a charge of lack of discovery, it bears only the burden of establishing a prima facie case of the evidence that a discovery has been made and still exists within the boundaries of the claim. United States v. Dredge Corp., 54 IBLA 201 (1981); United States v. King, 34 IBLA 15 (1978); Andrew J. Van Derpoel, supra; United States v. Johnson, 33 IBLA 121 (1977). The contestee in a mineral contest must prevail, if at all, upon the strength of his own case, rather than upon any weakness of the Government's case.

A prima facie case is established when a Government mineral examiner testifies that he examined the claim and found insufficient evidence of the discovery of a valuable mineral deposit. United States v. Fox, 53 IBLA 333 (1981); United States v. McDowell, 53 IBLA 270 (1981); United States v. Bartell, 31 IBLA 47 (1977); United States v. McClurg; 31 IBLA 8 (1977).

Our principal concerns pertain not to whether the Government met its burden; under the principle just discussed we find that a prima facie case was presented. The Government's examiner testified that he had examined the claims, had taken samples which were assayed for gold and silver, and that in his opinion the values reflected by the assays were not sufficient to justify a prudent person in the further expenditure of time and means in the hope of developing a paying mine. Whether appellants refuted the crucial elements of the Government's case is the key to the present appeal.

Although Judge Steiner's decision is not a model of clarity in that he attributed some testimony to the wrong claim, his conclusions are supported by the record, which we have reviewed de novo. We agree with Judge Steiner that the claimants have failed to present sufficient evidence to rebut the prima facie case of the Government that no discovery of a valuable mineral deposit was present on any of the claims on the date the lands were withdrawn from operation of the mining laws, September 28, 1976, or at the date of the hearing. The testimony of the parties and the assay reports of each do not disclose sufficient mineralization to justify a prudent person in investing labor and means with a reasonable prospect of successfully in developing a valuable mine. In so holding, we have considered the value of the minerals as of September 28, 1976, and the costs of extraction, removal, and marketing which would necessarily accompany any attempted development of the subject claims within the Death Valley National Monument.

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge